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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SUNEVA MEDICAL, INC., Plaintiff, Respondent, Cross-Appellant, v. STEFAN M. LEMPERLE et al., Defendants, Appellants, Cross-Respondents	D057871 (Super. Ct. No. 37-2008-00090739-CU-BC-CTL)

APPEAL from an order of the Superior Court of San Diego County, Jay M. Bloom, Judge. Affirmed in part, reversed in part.

Defendants Gottfried Lemperle, M.D. (Gottfried) and Stefan M. Lemperle, M.D. (Stefan, together defendants) appeal from portions of an order denying their special motion to strike two causes of action for fraudulent inducement in a nine cause of action complaint filed by Suneva Medical, Inc. (Suneva) under Code of Civil Procedure section 425.16, the anti-SLAPP (strategic lawsuit against public participation) statute. (All undesignated statutory references are to the Code of Civil Procedure.) Defendants also assert the trial

court erred in: (1) overruling all of their evidentiary objections to Suneva's submitted evidence; and (2) concluding that Suneva had demonstrated a probability of prevailing on five causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and seeking injunctive and declaratory relief.

Suneva also appeals, claiming the trial court erred in striking its interference with prospective economic advantage claims because they did not arise from protected activities. Even if the trial court properly concluded that these claims arose from protected activities, Suneva claims it satisfied its burden of establishing a probability of success. Suneva also asserts the trial court abused its discretion in failing to continue the motions to strike to permit limited discovery.

We conclude that the challenged causes of action do not arise from protected activity. Thus, we reverse the portions of the order granting the motion to strike and affirm the portions of the order denying the motion to strike.

FACTUAL AND PROCEDURAL BACKGROUND

Defendants are the cofounders of Artes Medical, Inc. (the Company), a publicly held medical aesthetics company focused on a new category of injectable products for the dermatology and plastic surgery markets. Stefan acted as the Company's chief executive officer and a member of its board of directors and Gottfried acted as a director, the vice president of research and development and chief scientific officer of the Company until they were removed from their positions based on alleged gross misconduct.

Stefan and the Company entered into a Separation Agreement and General Release wherein Stefan agreed to be bound by a separate confidentiality agreement, and to not: (1) solicit votes or encourage stockholders to take actions contrary to the actions recommended by a majority of the Company's board of directors; (2) interfere with the business of the Company; and (3) directly or indirectly disparage the Company. Gottfried and the Company entered a Separation Agreement and a Termination and General Release Agreement wherein Gottfried acknowledged being bound by a separate confidentiality agreement, and agreed, among other things to: (1) not directly or indirectly disparage the Company; and (2) preserve company secrets. (We refer to these agreements collectively as the separation agreements.) After leaving the Company, defendants maintained a significant financial interest in it through their shares of company stock.

The Company filed this action in August 2008 and filed for bankruptcy in December 2008. This action remained dormant until Suneva revived it in its own name, after allegedly having purchased the "rights to the claims" asserted in the action. The operative second amended complaint (the operative complaint) generally alleges that defendants never intended to comply with the terms of their separation agreements and that they conspired to undermine the management of the Company.

Specifically, Suneva alleged that defendants posted disparaging comments about the Company and its management on the Internet, violated their separation agreements by sharing confidential and proprietary information about the Company, contacted certain named customers of the Company to solicit their support in undermining the Company,

and intentionally interfered with the Company and its management. Stefan allegedly contacted investors to persuade them to challenge the Company's current management and spoke at a stockholder meeting denigrating the Company's directors. Defendants also allegedly: (1) "initiated and orchestrated Michael Shack's filing of a non-management preliminary proxy statement (the 'Proxy Challenge')" seeking to remove the Company's existing directors; (2) "conspired with Barry Rubin . . . to file an unfounded derivative lawsuit" in state court; and (3) conspired with Shack to file an unfounded lawsuit in federal court. (We refer to the state and federal actions together as the derivative actions.)

After filing the operative complaint, Suneva served third party subpoenas and requests for production of documents and special interrogatories. Defendants filed separate motions to strike, automatically staying discovery. In their motions, defendants alleged that the crux of Suneva's lawsuit was Suneva's allegation that defendants "caused" two derivative shareholder lawsuits and the Proxy Challenge to be filed after leaving the Company. Gottfried presented as exhibits the complaint filed by Rubin in state court, the complaint filed by Shack in federal court, and the Proxy Challenge filed by Shack with the Securities and Exchange Commission (SEC).

Thereafter, Suneva moved to conduct limited discovery and appeared ex parte for an order shortening time. The trial court denied the motion. After overruling defendants' evidentiary objections to the evidence that Suneva submitted in support of its claims, the trial court granted the motion to strike in part, and denied it in part.

Specifically, it found that Suneva's first and second causes of action for fraudulent inducement did not arise from protected activity, and denied defendants' motion to strike those claims. It found that defendants had shown that the gravamen of the third through seventh causes of action for breach of contract arose from protected activity, and granted defendants' motion to strike the third and fourth causes of action for interference. The court concluded, however, that Suneva had met its burden of establishing a probability of prevailing on its fifth through seventh causes of action for breach of contract and breach of implied covenant, and denied defendants' motion to strike those claims and the remaining claims seeking injunctive and declaratory relief. All parties have appealed.

DISCUSSION

I. *Burden of Proof and Standard of Review*

A special motion to strike under section 425.16 allows a defendant to gain early dismissal of a lawsuit that qualifies as a SLAPP. (§ 425.16, subd. (a).) In ruling on an anti-SLAPP motion, the trial court must first decide whether the moving defendant has made a prima facie showing that the plaintiff's suit is subject to section 425.16, i.e., that the challenged claims arise from an act or acts in furtherance of his or her right of petition or free speech. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).) These acts include: (1) written or oral statements made before a legislative, executive, or judicial proceeding; (2) written or oral statements made in connection with an issue under consideration or review by a legislative, executive, or judicial body; (3) written or oral statements made in a place open to the public or in a public forum in connection with an issue of public interest; or (4) any other

conduct in furtherance of the exercise of the constitutional right of petition or free speech in connection with a public issue or an issue of public interest. (§ 425.16, subd. (e).)

To determine whether a defendant has met its initial burden, we consider the pleadings and any supporting and opposing affidavits stating facts upon which the liability is based. (§ 425.16, subd. (b)(2); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79 (*City of Cotati*).) "[T]he 'arising from' requirement is not always easily met" and "the mere fact an action was filed after protected activity took place does not mean it arose from that activity." (*Equilon, supra*, 29 Cal.4th at p. 66.) A claim "arises from" an act when the act " ' "forms the basis for the plaintiff's cause of action". . . .' " (*Ibid.*) The "principal thrust or gravamen" of the claim determines whether section 425.16 applies. (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188, italics omitted.)

A cause of action that is based on both protected activity and unprotected activity is subject to section 425.16 "unless the protected conduct is 'merely incidental' to the unprotected conduct." (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 103 (*Mann*).) "Where a cause of action refers to both protected and unprotected activity and a plaintiff can show a probability of prevailing on *any part of its claim*, the cause of action is not meritless and will not be subject to the anti-SLAPP procedure." (*Id.* at p. 106.) If the defendant establishes the anti-SLAPP statute applies, the burden shifts to the plaintiff to demonstrate a "probability" of prevailing on the claim. (*Equilon, supra*, 29 Cal.4th at p. 67.) We review de novo the trial court's rulings on an anti-SLAPP motion. (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 645.)

II. *Defendants' Appeal*

A. Fraudulent Inducement (Claims 1, 2)

The trial court denied defendants' motion to strike Suneva's first and second causes of action for fraudulent inducement on the ground they did not meet their burden of showing the conduct alleged was in furtherance of their right to free speech. Defendants appeal, arguing these claims implicate protected petitioning activity.

Fraud in the inducement is a subset of the tort of fraud that occurs when the promisor's consent is induced by fraud. (*Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 294.) The elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) scienter or knowledge of its falsity; (3) intent to induce reliance; (4) justifiable reliance; and (5) resulting damage. (*Ibid*.) Here, Suneva alleged that when defendants entered into their respective separation agreements they represented that they intended to honor the promises made within the agreements, that the promises were false because defendants failed to abide by them, that the Company was ignorant of defendants' secret intention not to perform their promises, that the Company relied on defendants' promises to uphold the provisions in their respective separation agreements by offering more consideration for the agreements than it would have had it known of defendants' actual intentions, and the Company suffered damages as a result of its reliance on defendants' false representations.

The fraudulent inducement causes of action also allege that defendants "caused to be filed the Proxy Challenge" and incorporate by reference the allegation that defendants' act of "conspir[ing]" to file and "institut[ing]" the Proxy Challenge harmed the Company by interfering with its ability to obtain financing. Defendants, however, have not shown that the Proxy Challenge was made "before a legislative, executive, or judicial proceeding" or "in connection with an issue under consideration or review by a legislative, executive, or judicial body." (§ 425.16, subds. (e)(1), (e)(2).) In fact, defendants conceded in their briefing that "there never actually was a proxy challenge to [the Company's] management, but rather only an ineffectual *threatened* proxy challenge."

Relying on *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993 (*ComputerXpress*), the trial court concluded that the term "official proceeding" has been broadly interpreted to protect communications to government officials which may precede the initiation of formal proceedings and that the Proxy Challenge fell into this category of speech. While we have no quarrel with this general legal premise, we disagree with the trial court's conclusion.

In *ComputerXpress*, the defendants sent a letter of complaint to the SEC alleging wrongdoing by a corporate predecessor. (*ComputerXpress, supra*, 93 Cal.App.4th at p. 1008.) The court found that filing a complaint with the SEC qualified as a statement before an official proceeding under section 425.16, subdivision (e)(1) because the purpose of the complaint was prompt action by an official administrative agency. (*ComputerXpress, supra*, at p. 1009; *Fontani v. Wells Fargo Investments, LLC* (2005) 129 Cal.App.4th 719, 731-732 [A "Form U-5" filed with the National Association of

Securities Dealers was a protected statement because the "Form U-5" was a communication to an official body "designed to prompt official action."], disapproved on another ground in *Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192, 203, fn. 5.) However, an act that is a "purely business type event or transaction . . . is not the type of protected activity contemplated under section 425.16, subdivision (e)." (*Blackburn v. Brady* (2004) 116 Cal.App.4th 670, 676-677.) Unlike *ComputerXpress*, Shack's filing of the Proxy Challenge was not intended to prompt an SEC investigation or report wrongdoing; rather, it was a business type event to solicit proxies to use at the Company's annual meeting.

Nor have defendants shown that the Proxy Challenge constitutes "any other conduct in furtherance of the exercise of the constitutional right of petition or free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).) In the Proxy Challenge, Shack requested that the Company hold an annual meeting wherein he would seek to: amend the Company's bylaws, remove three current directors for cause, elect three new directors, and vote on the election of a different class of directors. Defendants tendered no argument on how such a request constitutes a "public issue" or a matter of "public interest" within the meaning of section 425.16.

Nonetheless, the trial court found that subsection (e)(4) of section 425.16 applied because the Company was a publicly traded company with about 16 million outstanding shares at the time of its initial public offering in 2006. We disagree.

The terms "public issue" and "public interest" do not lend themselves to precise definition (*Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 919-920 (*Rivero*)) and "we must consider each case in light of its own unique facts." (*Integrated Health Care Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, 526.) Nonetheless, such statements generally concern "a person or entity in the public eye [citations], conduct that could directly affect a large number of people beyond the direct participants [citations], or a topic of widespread public interest [citation]." (*Rivero*, *supra*, at p. 924.)

Here, the Company is not in the public eye. Issuing press releases, advertising your product, and being a publicly traded company are generic facts that apply to numerous other companies. (*Mann*, *supra*, 120 Cal.App.4th at p. 111 ["[T]he focus of the anti-SLAPP statute must be on the specific nature of the speech rather than on generalities that might be abstracted from it."].) Such facts do not make the Proxy Challenge a matter of public interest without evidence showing interest by a broad segment of society in the Company. Defendants do not suggest that the Proxy Challenge could potentially impact the market. (*Compare, Global Telemedia Intern., Inc. v. Doe 1* (C.D. Cal. 2001) 132 F.Supp.2d 1261, 1265 [publicly traded company with as many as 18,000 investors during an eight month period that generated 30,000 postings in an Internet chat room held to be a matter of public interest because it could impact market sectors or market as a whole].) Rather, the Proxy Challenge reflected a *potential* management dispute within the Company and defendants have failed to show that it dealt with "anything other than a private dispute between private parties." (*Weinberg v. Feisel*

(2003) 110 Cal.App.4th 1122, 1134.) The proper management of a company is a matter of general interest to the company's customers and employees, and the direct participants, but it is not a matter of public interest within the meaning of section 425.16. "[T]he assertion of a broad and amorphous public interest is not sufficient." (*Weinberg v. Feisel* at p. 1132.)

Finally, defendants have not shown that the Proxy Challenge constituted a writing or oral statement "made in a place open to the public or a public forum in connection with an issue of public interest." (§ 425.16, subd. (e)(3).) Although the Proxy Challenge is accessible to the public over the Internet (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41, fn. 4), as we have just discussed, it is not a matter of public interest.

Lastly, there is a distinction "between (1) speech or petitioning activity that is mere *evidence* related to liability and (2) liability that is *based on* speech or petitioning activity." (*Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1214-1215 (*Graffiti*).) The latter is a SLAPP suit, the former is not. (*Ibid*.) Here, Shack's filing of the Proxy Challenge is *evidence* of defendants' alleged acts done in violation of their separation agreements. Stated differently, the acts defendants undertook that ultimately triggered Shack's filing of the Proxy Challenge are not protected constitutional activity. (*City of Cotati*, *supra*, 29 Cal.4th at p. 78 ["That a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such."].)

Although the fraudulent inducement claims do not mention the derivative actions, they incorporate by reference the allegations that defendants "initiated and orchestrated" or "conspired" with third parties to file the derivative actions. Defendants argue that this incorporation is sufficient to make the fraudulent inducement claims "mixed," and claim that the allegations of protected conduct were not merely incidental to the unprotected activity because Suneva relies on the derivative actions to allege causation and damages. We disagree.

The constitutional right to petition includes the "basic act" of filing suit. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.) Here, however, the protected activity of filing the derivative actions was engaged in by third parties, not defendants. The "gist" of the fraudulent inducement claims is not the filing of the derivative actions; rather, it is defendants' agreement to not interfere with the Company and their violation of this agreement. The derivative actions filed by third parties at defendants' behest are evidence of defendants' wrongful conduct in violation of their separation agreements. (*Graffiti*, *supra*, 181 Cal.App.4th at pp. 1214-1215.) "[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*).) Here, we conclude the gravamen of the challenged causes of action was defendants' conduct in breaching their separation agreements, not their act of encouraging third parties to file the derivative actions. Indeed, in their respective separation agreements defendants' agreed to limit their right to free speech

regarding the Company. Thus, it is somewhat anomalous for defendants to bring a SLAPP motion under these circumstances.

Defendants' reliance on *Navellier* to support the trial court's order is misplaced. (*Navellier*, *supra*, 29 Cal.4th 82.) In *Navellier*, the plaintiff and defendant were engaged in federal litigation when the defendant executed a general release in favor of the plaintiff which partially settled the lawsuit. After executing the release, the defendant filed counterclaims against the plaintiff in the federal action. The plaintiff used the release as a defense against the counterclaims in the federal action and filed a state court action against the defendant for fraudulent inducement and breach of the release agreement. (*Id.* at pp. 85-87.)

Our Supreme Court concluded that the defendant's acts of negotiating and executing the release, the basis of the fraudulent inducement cause of action, fell within the ambit of the anti-SLAPP statute because it "involved 'statement[s] or writing[s] made in connection with an issue under consideration or review by a . . . judicial body' (§ 425.16, subd. (e)(2)), i.e., the federal district court . . . ." (*Navellier*, *supra*, 29 Cal.4th at p. 90.) The act of filing counterclaims in the federal action, the basis of the breach of contract cause of action in state court, also fell within the ambit of the anti-SLAPP statute inasmuch as "arguments respecting the Release's validity were 'statement[s] or writing[s] made before a . . . judicial proceeding' (*id*, subd. (e)(1)), i.e., the federal action." (*Ibid*.)

In contrast, defendants' execution and alleged breach of their respective separation agreements did not occur in the context of a legislative, executive, or judicial proceeding. (§ 425.16, subd. (e)(1) & (e)(2).) Nor did defendants' actions concern statements made in

connection with a public issue or an issue of public interest. (§ 425.16, subd. (e)(3) & (e)(4).) Accordingly, the fraudulent inducement causes of action do not fall within the ambit of the anti-SLAPP statute's "arising from" prong and the trial court properly denied defendants' request to strike these causes of action. (§ 425.16, subd. (b)(1).) Because defendants have not demonstrated that they were engaged in protected activity within one of the four categories of conduct embraced by section 425.16, subdivision (e), we need not reach the second prong of the SLAPP analysis.

B. Breach of Contract and Implied Covenant (Claims 5-7)

Defendants appealed the denial of their motion to strike the fifth through seventh causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing on the basis that Suneva did not establish the probability of prevailing on the merits of these claims. Neither party submitted argument on whether defendants made a threshold showing that these causes of action arose from protected activity. Accordingly, in our de novo review of the propriety of the trial court's order we requested and received further briefing on whether defendants made a showing that these causes of action arose from protected activity.

We conclude that defendants have not shown that these causes of action arose from protected activity; and thus, the motion to strike these claims should have been denied on this basis. Accordingly, we need not address defendants' additional claims that the trial court erroneously overruled their evidentiary objections and Suneva did not meet its burden of demonstrating a probability of prevailing on the merits of these claims.

Suneva's breach of contract claims against defendants allege Stefan breached confidentiality agreements and his separation agreement by: (1) interfering with the Company's business; (2) disparaging the Company; and (3) soliciting votes and encouraging other shareholders to vote against the recommendation of the majority of the board of directors. Similarly, Suneva alleges that Gottfried breached his confidentiality agreement by failing to preserve the confidentiality of the Company's proprietary information and using such information for his own personal benefit. It also alleges that Gottfried breached his separation agreement by disparaging the Company. Suneva claims both defendants breached the implied covenant of good faith and fair dealing within their respective agreements by interfering with the business and management of the Company because the intent of the parties in entering into the separation agreements was for defendants to terminate all association with the Company.

These three causes of action incorporate by reference the allegations that: defendants' act of "conspir[ing]" to file and "institut[ing]" the Proxy Challenge harmed the Company by interfering with its ability to obtain financing; and defendants "initiated and orchestrated" or "conspired" with third parties to file the derivative actions. As discussed above, defendants have not shown that the Proxy Challenge was a protected activity within the meaning of section 425.16. (*Ante*, pt. II.A.) Additionally, the gravamen of these claims was defendants' conduct in breaching their confidentiality or separation agreements, not their acts of encouraging third parties to file the derivative actions. Suneva mentions the derivative actions as evidence of the defendants' failure to abide by their promises and such reference is incidental to the gravamen of these claims.

Accordingly, the trial court did not err in denying the motion to strike these claims.

C. Equitable Remedies (Claims 8, 9)

Labeled as the eighth and ninth causes of action, Suneva sought injunctive relief regarding defendants' disparaging comments against the Company and declaratory relief regarding the parties' respective rights and obligations under the separation agreements. Declaratory relief and injunctive relief are equitable remedies. (*In re Claudia E.* (2008) 163 Cal.App.4th 627, 633; *Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 646.) Defendants did not specifically address these equitable remedies in their respective motions; rather, they argued that all causes of action fell within the anti-SLAPP statute.

Putting aside the issue that injunctive and declaratory relief are equitable remedies, not causes of action subject to the anti-SLAPP statute (see *Wong v. Tai Jing* (2010) 189 Cal.App.4th 1354, 1361, fn. 2), defendants concede that these remedies stand or fall with the causes of action alleged within the complaint. Because the anti-SLAPP statute does not apply to the challenged causes of action, the related remedies may stand. (See *ante*, pt. II.A and II.B.; *post*, pt. III.)

Defendants also argue for the first time on appeal that these remedies should be stricken because Suneva has not shown how defendants' actions toward the Company will have any effect on Suneva. "It is axiomatic that arguments not asserted below are waived and will not be considered for the first time on appeal. [Citations.]" (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3.) These contentions are more appropriately addressed to the trial court on remand.

III. *Suneva's Appeal*

Suneva contends the trial court erred in striking its interference with prospective economic advantage claims because these claims did not arise from protected activities. Even if the trial court properly concluded that these claims arose from protected activities, Suneva asserts that it satisfied its minimal burden of establishing a probability of success. Finally, Suneva argues the trial court abused its discretion in failing to continue the hearing on the motions to permit limited discovery. We conclude that defendants have not shown that these causes of action arose from protected activity; accordingly, we need not address Suneva's remaining claims.

Suneva's third and fourth causes of action for intentional and negligent interference with prospective economic advantage incorporate by reference the prior allegations regarding defendants' wrongdoing. These claims additionally assert that defendants knew the Company was seeking financing to support its continued operations and they conspired to interfere with the Company's financing by causing the Proxy Challenge to be filed. Defendants have not shown that the Proxy Challenge was a protected activity within the meaning of section 425.16, as the Proxy Challenge was not made: (1) before or in connection with an issue under consideration or review by a legislative, executive, or judicial body; or (2) in connection with a public issue or an issue of public interest. (*Ante*, pt. II.A.) To the extent these claims can be considered "mixed" causes of action, the gravamen of the claims is defendants' conduct in breaching the provisions of their separation agreements, which is not petitioning activity within the meaning of section 425.16.

Similarly, the fact Suneva brought these claims against defendants after third parties filed the derivative actions and that these claims "may have been triggered by" those actions, does not show that Suneva's claims arise from the derivative actions. (*City of Cotati, supra*, 29 Cal.4th at p. 78.) Here, the conduct that forms the basis of Suneva's causes of action—defendants' wrongdoing in alleged violation of their separation agreements—were not acts in furtherance of the right of petition or free speech. (*Equilon, supra*, 29 Cal.4th at p. 66.)

Accordingly, the trial court erred in striking Suneva's interference with prospective economic advantage claims because these claims did not arise from protected activities.

DISPOSITION

The portions of the order granting the motion to strike are reversed and the portions of the order denying the motion to strike are affirmed. Suneva is awarded costs on appeal. We defer to the trial court the factual determination of whether Suneva is entitled to attorney's fees under section 425.16, subdivision (c), as the prevailing party on the anti-SLAPP motion.

MCINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.